U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0317 BLA

WALLACE H. UZZLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/25/2020
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Jeffrey R. Soukup (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2012-BLA-05876) of Administrative Law Judge Jonathan C. Calianos, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on June 24, 2011, and is before the Board for a second time.

In its previous decision on employer's appeal, a majority of the Board's three-member panel vacated the award of benefits because the administrative law judge erred in evaluating whether the claim was timely filed.[1] *Uzzle v. Island Creek Coal Co.*, BRB No. 17-0229 BLA, slip op. at 2-7 (Feb. 13, 2018) (unpub.) (Rolfe, J., concurring and dissenting). In the interest of judicial efficiency, the Board addressed whether claimant established entitlement to benefits notwithstanding whether the claim was timely filed. *Id*. at 7-10. The Board affirmed, as unchallenged by the parties, the administrative law judge's findings claimant had twenty-six years of underground coal mine employment,[2] a totally disabling respiratory impairment, and invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[3] 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.204(b)(2); *Uzzle*, BRB No. 17-0229 BLA, slip op. at n. 2. The Board also affirmed his finding employer failed to rebut the presumption. *Id*. at 7-10. The Board instructed the administrative law judge if he finds on remand that claimant timely filed his claim, he must reinstate the award of benefits. *Id*. at 10.

On remand, in considering the timeliness issue, the administrative law judge found employer failed to rebut the presumption that this claim was timely filed. 20 C.F.R. §725.308. Pursuant to the Board's instructions, the administrative law judge reinstated the award of benefits.

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[1] Administrative Appeals Judge Jonathan Rolfe would have affirmed the administrative law judge's finding that the claim was timely filed. *Uzzle v. Island Creek Coal Co.*, BRB No. 17-0229 BLA, slip op. at 10-12 (Feb. 13, 2018) (unpub.) (Rolfe, J., concurring and dissenting).

[2] The record reflects that claimant's last coal mine employment occurred in Kentucky. Hearing Transcript at 50; Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Under Section 411(c)(4), claimant is entitled to a rebuttable presumption he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305.

On appeal, employer argues the administrative law judge lacked the authority to preside over the case because he was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[4] In addition, it contends the administrative law judge erred in finding the claim timely filed. It also challenges the constitutionality of the Section 411(c)(4) presumption and alternatively contends the administrative law judge erred in finding it did not rebut the presumption. Claimant responds in support of the awards of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting employer forfeited its Appointments Clause challenge and urging the Board to reject employer's contention that the Section 411(c)(4) presumption is unconstitutional. Employer has filed a reply brief asserting it is not foreclosed from challenging the rebuttal findings.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's decision and order if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362 (1965).

Appointments Clause

Employer urges the Board to vacate the award and remand the case to be heard by a different, constitutionally appointed administrative law judge pursuant to *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018).[5] Employer's Brief at 28-32. It acknowledges the

[4] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

[5] *Lucia* involved an Appointments Clause challenge to the appointment of a Securities and Exchange Commission (SEC) administrative law judge. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC administrative law judges are "inferior officers" subject to the Appointments Clause.

Secretary of Labor ratified the prior appointments of all sitting Department of Labor (DOL) administrative law judges on December 21, 2017,[6] but maintains the ratification was insufficient to cure the constitutional defect in the administrative law judge's prior appointment.[7] *Id*. Employer first raised this issue on remand.[8]

We agree with the Director that employer forfeited its Appointments Clause argument by failing to raise it when the case was previously before the Board. *See Lucia*, 138 S.Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Young*, 947 F.3d 399 (6th Cir. 2020) (upholding forfeiture for failure to raise Appointments Clause challenge pursuant to Board's issue-exhaustion requirements); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018) ("Appointments Clause challenges are not jurisdictional and thus are subject to ordinary principles of waiver and forfeiture.")

Lucia v. SEC, 585 U.S. , 138 S.Ct. 2044, 2055 (2018) (citing *Freytag v. Commissioner*, 501 U.S. 868 (1991)).

[6] The Secretary of Labor issued a letter to the administrative law judge on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an Administrative Law Judge. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, administrative law judges of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

See October 3, 2018 Telephonic Hearing at 6 (referencing Secretary's December 21, 2017 Letter to Administrative Law Judge Calianos).

[7] On July 20, 2018, the Department of Labor conceded the Supreme Court's holding in *Lucia* applies to its administrative law judges. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

[8] Employer did not raise an Appointments Clause challenge when this case was first before the administrative law judge or in its prior appeal to the Board. On remand, the administrative law judge held a telephonic conference on July 20, 2018 during which employer requested the case be reassigned and heard by a different, constitutionally appointed administrative law judge. The administrative law judge issued an October 11, 2018 Order holding employed had forfeited its Appointment Clause challenge.

(internal citation omitted); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its opening brief); Director's Brief at 3-5.

The exception for considering a forfeited argument due to extraordinary circumstances recognized in *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018), is inapplicable here because, unlike the Federal Mine Safety and Health Review Commission, the Board has the long-recognized authority to address properly raised questions of substantive law. *Island Creek Coal Co. v. Bryan*, 937 F.3d 738 (6th Cir. 2019); *see Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116-17 (6th Cir. 1984) (holding that because the Board performs the identical appellate function previously performed by the district courts, Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts). Furthermore, employer has not identified any basis for excusing its forfeiture. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (cautioning against excusing forfeited arguments because of the risk of sandbagging). Therefore, we reject employer's argument that this case should be remanded to the Office of Administrative Law Judges for a new hearing before a different administrative law judge.

Timeliness of the Claim

"Any claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner" and a rebuttable presumption provides that every claim is timely filed. 20 C.F.R. §725.308(a), (c). To rebut this presumption, employer must show, by a preponderance of the evidence, that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Zurich v. Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 299-300 (6th Cir. 2018) (Kethledge, J., concurring); *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95 (6th Cir. 2013).

The majority of the three member panel previously vacated the timeliness finding because the administrative law judge committed a number of errors. It held he erred in finding the denial of claimant's state workers' compensation claim rendered a possible communication from Dr. Houser to claimant that he is totally disabled due to pneumoconiosis a misdiagnosis. *Uzzle*, BRB No. 17-0229 BLA, slip op. at 5 (holding the administrative law judge misapplied the decision in *Eighty Four Mining Co. v. Director, OWCP* [*Morris*], 812 F.3d 308 (3d Cir. 2016) to the facts of this case). It also held he erred by failing to issue a definitive credibility finding with respect to whether claimant's hearing

testimony established Dr. Houser communicated to claimant he was totally disabled due to pneumoconiosis three years before filing this claim. *Id*. at 5-6. Finally, it held he erred in failing to consider claimant's hearing testimony in its entirety when evaluating this issue. *Id*. The Board instructed the administrative law judge to reconsider claimant's hearing testimony and render credibility findings that comply with the Administrative Procedure Act (APA).[9] *Id*.

Pursuant to these remand instructions, the administrative law judge evaluated claimant's hearing testimony with respect to Dr. Houser's possible communication of medical information to claimant "around 2000 or 2001." Decision and Order on Remand at 5-6. He first found claimant's testimony on this issue entitled to "reduced weight" because claimant "contradicted himself multiple times." *Id*. Specifically, claimant first testified Dr. Houser told him he was totally disabled by black lung disease "probably . . . around 2000, 2001" but then denied Dr. Houser ever informed him "he couldn't go back to work because of [his] breathing problems." *Id*., *citing* Hearing Transcript at 47. Claimant also stated that he "can't recall" if Dr. Houser ever told him his breathing problems "would interfere with [his] ability to work." *Id*.

In addition, the administrative law judge found claimant provided an "imprecise and uncertain recollection" regarding when Dr. Houser may have communicated this information to him. Decision and Order on Remand at 5-6, *citing* Hearing Transcript at 46-47, 55. He noted claimant's imprecise testimony that he "probably" visited Dr. Houser "around 2000, 2001" and also "back in the nineties." *Id*. He also found that while claimant later confirmed Dr. Houser "was one of several doctors who told him he had black lung disease before he filed his application for [state benefits] in 1999," he then testified "he thinks he saw [Dr.] Houser in early 2000, which is after he filed his application in 1999." *Id*., *citing* Hearing Transcript at 55, 58.

Finally, the administrative law judge determined the documentary evidence undermined claimant's testimony. Decision and Order on Remand at 6-7. Specifically, he noted the record includes Dr. Houser's 2012 medical report and 2015 deposition testimony. *Id*.; *see* Claimant's Exhibit 1; Employer's Exhibit 13. The administrative law judge found Dr. Houser did not indicate in the report or testimony that he examined claimant before 2012, nor did the record contain any other evidence that supported claimant's testimony that Dr. Houser "actually met with [claimant] before 2012." Decision and Order at 6-7.

[9] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).

Thus the administrative law judge found that Dr. Houser's "report dated August 6, 2012 is the first instance where he opined [c]laimant was totally disabled." *Id.*

We reject employer's assertion the administrative law judge previously found claimant's testimony credible and sufficient to commence the statute of limitations in his original decision. Employer Brief at 10. Employer's characterization is belied by a plain reading of the record. In his initial decision, the administrative law judge did not make a credibility finding regarding claimant's testimony. Rather, he found claimant's testimony insufficient to commence the statute of limitations based on his determination claimant's denied state claim would have rendered any such communication from Dr. Houser a misdiagnosis. 2017 Decision and Order at 3-6. The majority of the Board remanded the case precisely for him to evaluate claimant's testimony and the record as a whole in the first instance. *Uzzle*, BRB No. 17-0229 BLA, slip op. at 3-5. Indeed, to the extent the administrative law judge did interpret the portion of claimant's testimony most favorable to employer in his previous decision, he characterized it in a way that could not meet employer's burden under the law. *See* 2017 Decision and Order at 6 ("This testimony *suggests* that the claimant *may have had* a diagnosis of total disability due to coal worker's pneumoconiosis more than three years before he filed his claim.") (emphasis added). Employer's timeliness argument in this appeal is simply an attempt to replace the administrative law judge's detailed and reasoned weighing of claimant's testimony and the record as a whole with its own labyrinthine interpretation of that straightforward evidence. Employer's Brief at 10-22.

Contrary to employer's argument, the administrative law judge permissibly found claimant's testimony is not credible because it is "inconsistent, unreliable and is without support from the evidentiary record." Decision and Order on Remand at 5; *see Zurich*, 889 F.3d at 299-300; *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (the administrative law judge is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's testimony is "insufficient to establish that a diagnosis of totally disabling coal workers' pneumoconiosis was communicated to him by Dr. Houser" three years before this claim was filed. Decision and Order at 5; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305 (6th Cir. 2005) (defining substantial evidence as relevant evidence that a reasonable mind might accept as adequate to support a conclusion.). We further affirm the administrative law judge's finding that employer failed to rebut the presumption that this claim was timely filed. *Zurich*, 889 F.3d at 299-300; *Brigance*, 718 F.3d at 594; 20 C.F.R. §725.308(a).

Constitutionality of the Affordable Care Act and the Section 411(c)(4) Presumption

Citing *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), employer contends the Affordable Care Act (ACA), Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption, is unconstitutional. Employer's Brief at 32-35. Employer cites the district court's rationale in *Texas* that the ACA requirement for individuals to maintain health insurance is unconstitutional and the remainder of the law is not severable. *Id*.

After the parties submitted their briefs, the United States Court of Appeals for the Fifth Circuit held the health insurance requirement in the ACA unconstitutional but vacated and remanded the district court's determination that the remainder of the ACA must also be struck down. *Texas v. United States*, 945 F.3d 355, __ (5th Cir. 2019) (King, J., dissenting). Moreover, the United States Court of Appeals for the Fourth Circuit has held the ACA amendments to the Black Lung Benefits Act are severable because they have "a stand-alone quality" and are fully operative. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *cert. denied*, 568 U.S. 816 (2012). Further, the United States Supreme Court upheld the constitutionality of the ACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). We therefore reject employer's argument that the Section 411(c)(4) presumption is unconstitutional and inapplicable to this case.

As the Board previously affirmed the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption, that holding constitutes the law of the case. *Uzzle*, BRB No. 17-0229 BLA, slip op. at 7-10; *see Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990). In this appeal, employer reiterates the arguments the Board rejected in its prior Decision and Order and cites no valid exception to the law of the case doctrine. *Brinkley*, 14 BLR at 1-151; Employer's Brief at 23-28; Employer's Reply at 2-3. We therefore decline to disturb the Board's prior holding and further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge